

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)
)
)

Time Warner Cable)
)
)

Petition for Finding of Bad Faith)
Retransmission Consent Negotiations)
)

KVOA Communications, Inc.)
KRIS-TV, Corpus Christi, Texas)

File No. CSR-_____

MB Docket No. 12-1

To: The Secretary's Office
Attn: The Media Bureau

**PETITION FOR FINDING OF BAD FAITH
RETRANSMISSION CONSENT NEGOTIATIONS**

KVOA Communications, Inc. ("Cordillera"),¹ licensee of local Corpus Christi NBC-affiliate KRIS-TV, local CW affiliate KRIS-DT2, local Telemundo affiliate K68DJ ("KAJA"), and local independent station K47DF ("KDF") (collectively, the "Stations"), hereby petitions the Commission pursuant to Section 76.7 of the Commission's rules for a finding that Time Warner Cable ("TWC") has negotiated retransmission consent in bad faith in violation of Section 325(b)(3)(C) of the Communications Act and Section 76.65 of the Commission's rules.² To remedy this violation, Cordillera requests that the Commission issue an order requiring TWC to return to the negotiating table and commence an enforcement action against TWC for its violations of the good-faith negotiation requirement. With the Super Bowl on NBC approaching, timely Commission grant of the requested relief is crucial to restoring relied-upon service to Corpus Christi viewers. Such relief also is necessary to maintain the integrity of the retransmission consent negotiation process (which in turn is critical to maintaining local television service to cable subscribers).

¹ KVOA Communications, Inc. is a subsidiary of Cordillera Communications, Inc.

² 47 C.F.R. §§ 76.7, 76.65; 47 U.S.C. § 325(b)(3)(C).

I. BACKGROUND AND INTRODUCTION

One month ago, Time Warner Cable decided to “get tough” on its approximately 80,000 Corpus Christi, Texas cable customers by dropping the signals of KRIS-TV, KRIS-DT2, KAJA, and KDF, all of which have long been carried on TWC’s Corpus Christi cable system. Since it dropped the Stations just before midnight on December 12, 2011, TWC has deprived its viewers of more than 21 hours of local news per week aired by KRIS-TV and the market’s only 9 p.m. local news airing by KDF, as well as important sporting events of intense local interest like the NFC East Championship game between the Dallas Cowboys and New York Giants on January 3, 2011 (which was the most watched primetime NFL game in 15 years) and the NFL Wildcard playoff matchup between the Houston Texans and the Cincinnati Bengals. During this month-long time, TWC has almost entirely failed to negotiate, providing a single new offer one week after it dropped the signals (to which Cordillera promptly responded) and then refusing to counter for nineteen days. Finally, on January 9, 2012, TWC responded to KRIS-TV’s offer from December 21, 2011, but its response appeared to be an attempt to punish Cordillera rather than a good faith attempt to reach common ground. TWC’s last offer on January 9, 2012 backtracked on several key terms and represents regressive bargaining leaving Cordillera little choice but to file this complaint.

While TWC has had next to nothing of substance to say to Cordillera, it has had plenty to say to the press, claiming falsely that Cordillera forced it to remove the channels from its system and that it remained available to do a deal “seven days a week.”³ Contrary to these false public claims, Cordillera has offered TWC extensions to continue carrying the Stations with no strings attached, and

³ See, e.g., Mike D. Smith, *Corpus Christi TV Blackout One of Only Two Nationwide for Time Warner, Company Says*, CORPUS CHRISTI CALLER.COM, Jan. 7, 2012, available at <http://www.caller.com/news/2012/jan/07/corpus-christi-tv-blackout-one-of-only-two-for/>; Mike D. Smith, *Time Warner Drops KRIS-NBC, Other Television Stations*, CORPUS CHRISTI CALLER.COM, Dec. 13, 2012, available at <http://www.caller.com/news/2011/dec/13/time-warner-cable-drops-kris-nbc-other-television/>.

between December 21 and January 9, Cordillera had been waiting “seven days a week” for TWC to return to the bargaining table.

TWC’s bad-faith refusal to extend carriage of the Stations or negotiate towards mutually agreeable carriage terms since December 21, 2011, is a continuation of TWC’s long-standing public protest against paying broadcasters fair value for retransmission of broadcast signals. Cordillera commenced negotiations for retransmission of the Stations on August 23, 2011, by sending a retransmission consent election letter.⁴ Cordillera offered TWC competitive market rates on a per-subscriber basis for carriage of the Stations that were consistent with the rates local NBC affiliates are receiving in comparable markets. Almost immediately, it became clear that TWC has no intention of paying market rates for the Stations – its initial offer was less than one-third of the rate Cordillera proposed. With the parties existing retransmission consent agreement set to expire on October 31, 2011 and the vast distance separating the parties’ negotiating positions, Cordillera offered, and TWC accepted, an extension of retransmission consent for the Stations with no strings attached until November 30, 2011.

Cordillera and TWC exchanged offers and counteroffers in late October and November, but the parties remained far apart on the issue of per-subscriber rates. While Cordillera made substantial efforts to compromise by cutting its total compensation request by over 30% by the end of November, TWC raised its proposed rate by only a single penny. TWC’s offer thus remained far below the market rate for the Stations that by that point already had been established in deals between broadcasters and cable operators across the country. On November 29, 2011, with the expiration of the then-current retransmission consent extension looming, Cordillera offered TWC a

⁴ See Exhibit 1 (letter from Tim Noble, President and General Manager, KRIS-TV, to Time Warner Cable, Inc., dated August 23, 2011). Mr. Noble has conducted all negotiations between the Stations and TWC. TWC was represented by Susan Kleckner, TWC’s Director of Programming, Texas, between October 4, 2011 and November 11, 2011, and by Alexis Johnson, TWC’s Vice President, Content Acquisition, since November 11, 2011. Each of the factual assertions included in this Petition is attested by Mr. Noble’s Declaration, which is attached as Exhibit 2.

further extension – again with no strings attached – through December 31, 2011. In making this offer, Cordillera explained that it was nearing completion of a number of other deals that would help clarify the market value for retransmission of the Stations. TWC rejected Cordillera's invitation to take a breather in negotiations and demanded that Cordillera provide a new counter-offer. TWC also rejected Cordillera's offer of an extension through the end of the year, instead agreeing to an extension only through December 12, 2011. Cordillera agreed to the extension through that date.

Between December 7 and 12, 2011, TWC and Cordillera exchanged several counter-offers, but were unable to reach a deal. While Cordillera had reduced the value of its overall compensation request by nearly half, TWC was willing to increase its offer by less than a dime per subscriber. As the parties retransmission consent extension wound down, Cordillera again reiterated its offer of a no-strings extension of retransmission consent for TWC through December 31, 2011.⁵ Cordillera posted this letter on KRIS's website to demonstrate to viewers that KRIS was not demanding removal of the Stations from TWC's cable system. Despite Cordillera's efforts to maintain carriage of the Stations, at 11:59 pm on December 12, 2011, TWC deleted them, depriving viewers of a several sources of relied-upon local news, weather, sports, entertainment, and foreign-language programming.

What is worse, since dropping the Stations, TWC basically has refused to negotiate. On December 19, 2011, after a seven day delay, TWC made a counteroffer to Cordillera. Cordillera responded two days later. Between December 21, 2011 and January 9, 2012 – a period of nineteen days of depriving its 80,000 subscribers of the Stations' programming – TWC refused to counter Cordillera's standing offer. During that period, TWC on several occasions told Cordillera that it was working on a counter, but it failed to deliver one for almost three weeks.

⁵ See Exhibit 3 (Letter from Timothy P. Noble, President and General Manager, KRIS Communications, to Time Warner Cable).

Then finally on January 9, 2012, TWC provided a counter that can only be characterized as punitive. TWC offered a pro forma increase in the per-subscriber rate, but in exchange it took away key carriage protections and added additional terms that it knew would be unacceptable to Cordillera. During the three week period when TWC was not negotiating, its chief negotiator called KRIS-TV's general manager Tim Noble on several occasions claiming that he wanted to better understand what Cordillera was seeking. Mr. Noble explained that Cordillera wanted to enter into a three-year deal, which is the industry standard and is consistent with every retransmission agreement that Cordillera signed with every cable operator this year. At the time, TWC was offering a three-and-a-half year deal. Rather than attempting to bridge the gap, TWC's January 9, 2012 offer sought five years – a result that TWC knew would be unacceptable. Similarly, in his conversations with TWC's negotiator, Mr. Noble explained that to help bring the parties closer together Cordillera was willing to consider giving TWC the right to place certain of its Stations on the digital tier. TWC responded to this gesture of good faith by offering to take away key channel position protections that the Stations had held for decades and had never been on the table. Again, rather than bringing the parties closer together, TWC's January 9, 2012 offer drove them further apart. Finally, in their many conversations Mr. Noble explained to TWC's negotiator that the paid programming provisions for KRIS-TV's CW Plus multicast channel would have to change. Otherwise, TWC would have the right to drop the CW Plus the moment the parties signed the agreement. Given that TWC carries the CW Plus in dozens of other markets and given that TWC's negotiator said he understood the concerns, Cordillera naively assumed that TWC would address this simple issue. Cordillera was wrong. TWC made no changes to the paid programming provisions despite knowing that Cordillera could not sign an agreement that gave TWC the right to drop its programming the moment the ink was dry. Despite Cordillera's extreme disappointment with TWC's counter proposal, Cordillera responded with its own counter the following day.

Despite TWC's refusal to advance negotiations between the parties, TWC continues to lie to the public and the press, claiming that Cordillera forced the Stations from its cable systems, that Cordillera is demanding a 400% increase in retransmission consent fees, and that TWC remains available "seven days a week" to make a deal.⁶ The truth is that the just the opposite – Cordillera did everything in its power to keep the Stations available to TWC subscribers, the parties' offers were not very far apart (until TWC backtracked on several key terms on January 9, 2012), and TWC will barely negotiate even one day a week, let alone seven.

II. TWC IS GUILTY OF BAD FAITH NEGOTIATIONS.

TWC's failure to negotiate for almost three weeks, its apparently punitive refusal of Cordillera's offer to extend carriage of the Stations during ongoing negotiations, and its most recent offer which TWC knew would drive the parties further apart constitutes bad faith negotiations and violates Section 325(b)(3)(C) of the Communications Act (the "Act") and Section 76.65(b) of the Commission's rules.⁷ The Commission evaluates bad faith negotiation claims under a list of specific negotiating standards and also according to the "totality of the circumstances" surrounding the negotiations.⁸ TWC's actions in this case unquestionably constitute bad faith negotiations under both the *per se* and "totality of the circumstances" tests.

TWC's refusal to negotiate retransmission consent of the Stations for almost three weeks between December 19, 2011 and January 9, 2012 – a period of nineteen days while the Stations have been off the air – constitutes a blatant *per se* failure to negotiate in violation of Sections

⁶ See Exhibit 4 (online notice of service change); Mike D. Smith, *Corpus Christi TV Blackout One of Only Two Nationwide for Time Warner, Company Says*, CORPUS CHRISTI CALLER.COM, Jan. 7, 2012, available at <http://www.caller.com/news/2012/jan/07/corpus-christi-tv-blackout-one-of-only-two-for/>; Mike D. Smith, *Time Warner Drops KRIS-NBC, Other Television Stations*, CORPUS CHRISTI CALLER.COM, Dec. 13, 2012, available at <http://www.caller.com/news/2011/dec/13/time-warner-cable-drops-kris-nbc-other-television/>.

⁷ 47 U.S.C. § 325(b)(3)(C); 47 C.F.R. § 76.65(b).

⁸ See 47 C.F.R. § 76.65(b).

76.65(b)(1)(i) and (v).⁹ Cordillera and TWC spoke for several hours during this period, and TWC promised that a counteroffer was forthcoming. Day after day, nothing arrived. The rules require TWC to negotiate and to respond when Cordillera places offers on the table. TWC has done neither while the Stations' viewers have been deprived of important local news and cherished local sporting events, including the most important football game of the season for the Dallas Cowboys (the most popular team in the market) and the first ever playoff game for the Houston Texans (the second most popular team). TWC's strategy is obvious – it seeks to force Cordillera to lower its rate requests to TWC's non-market demands by slowing negotiations to a crawl and hoping the Stations' viewers and advertisers turn against Cordillera.

When TWC's January 9, 2012 offer finally did arrive, it lacked the sincerity of purpose required under the Commission's rules. To negotiate in good faith, a party must have "a sincere desire to reach an agreement that is acceptable to both parties."¹⁰ In the many conversations leading up to the January 9, 2012 offer, Cordillera made it clear that it expected to enter into an industry-standard three-year deal. TWC responded on January 9, 2012 by increasing its three-and-a-half year proposal to a five-year proposal. Cordillera explained that any agreement could not give TWC the right to drop the CW Plus at its whim. TWC responded on January 9, 2012 with the same punitive paid programming provisions that Cordillera had explained on numerous occasions could not work. When TWC sent its January 9, 2012 offer, it could not reasonably have believed that the carriage terms would be acceptable to Cordillera. Therefore, the January 9, 2012 offer – which took nineteen days to formulate – was not a bona fide proposal and violates the Commission's good faith obligations.

⁹ See *id.* at § 76.65(b)(1)(i), (v).

¹⁰ *Implementation of the Satellite Home Viewer improvement Act of 1999*, 15 FCC Rcd 5445, 5458 (2000).

The totality of the circumstances in this case likewise demonstrate TWC's bad faith beyond any doubt under the "totality of the circumstances test."¹¹ Consider:

- TWC refused to execute an extension that would have kept the Stations on its cable systems through December 31, 2011, then loudly advertised that Cordillera had withdrawn retransmission consent.
- TWC repeatedly demanded carriage of the Stations at significantly below-market rates, then told customers Cordillera was trying to stick them with a 400% rate increase – a number that TWC never has substantiated and cannot substantiate.
- TWC continues to claim that Cordillera is the party unwilling to make a deal when TWC let Cordillera's offer linger on the table for nineteen days before responding with an unreasonable, bad faith proposal that it knew would be unacceptable.

All the while, TWC has been seeking to poison negotiations by posting outright lies on its website and making egregious misrepresentations to the press. TWC's conduct has a name – it's called bad-faith negotiations and the FCC's rules proscribe it. Indeed, this is exactly the kind of bare-knuckles tactics that the good-faith bargaining rules were designed to prevent. But the rules can only work if the Commission enforces them and in this case, that means finding TWC guilty of violating Section 76.65 of the rules.

The proper remedy for TWC's bad faith in this case is an order requiring TWC to return to the bargaining table and sincerely negotiate with the goal of reaching an agreement. Moreover, to ensure that TWC does not continue disregarding the good faith rules, the Commission should commence enforcement action proposing to fine TWC for its misconduct. The Commission's rules do not specify a base forfeiture for bad-faith negotiations, but the base penalty for violations of the television broadcast carriage rules is \$7,500.¹² In considering TWC's punishment, the Commission should evaluate whether to consider each day that each Station's signal is not carried as a result of bad faith negotiations as constituting a separate violation of the rules. Such a rule would be appropriate in this case to address TWC's repeated and willful violation of the Act and the

¹¹ *Id.* at § 76.65(b)(2).

¹² 47 C.F.R. § 1.80 (note to paragraph (b)(4)).

Commission's rules and would function as a strong deterrent to both TWC and other cable operators imitating TWC's actions here.

II. CONCLUSION

For the foregoing reasons, Cordillera requests that the Commission grant the relief requested herein.

Respectfully submitted,

KVOA COMMUNICATIONS, INC.

A handwritten signature in cursive script, appearing to read "Michael D. Basile", written over a horizontal line.

Michael D. Basile

Jason E. Rademacher

Robert J. Folliard, III

DOW LOHNES PLLC

1200 New Hampshire Ave., NW

Suite 800

Washington, D.C. 20036

Its Attorneys.

January 12, 2012

EXHIBIT

1

RETRANSMISSION CONSENT ELECTION LETTER



August 23, 2011

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Time Warner Cable Inc.
290 Harbor Drive
Stamford, Connecticut 06902
Attn: Executive Vice President and General Counsel and
Executive Vice President, Programming

Re: Election Notice

Dear Ladies and Gentlemen:

KVOA Communications, Inc. ("Broadcaster") provides Time Warner Cable Inc. ("Operator") with this notice pursuant to Section 325 of the Communications Act of 1934, as amended, and Section 76.64(f) of the Rules and Regulations of the Federal Communications Commission. Broadcaster is the licensee of KRIS-TV, Corpus Christi, Texas (the "Station").

For the period January 1, 2012 through December 31, 2014, Broadcaster hereby elects RETRANSMISSION CONSENT with respect to the primary video stream of the Station's digital signal on each of Operator's multichannel video programming distribution systems the Station's market, including but not limited to those multichannel video programming distribution systems identified in or covered by Broadcaster's retransmission consent agreement with Operator and/or listed in Attachment A.

Please direct any questions or correspondence to me at the address on this letter.

Very truly yours,

Timothy P. Noble
President and General Manager
KVOA Communications, Inc.

Attachment
cc (by e-mail): Public Inspection Files

cc (by mail): Susan Hinson
Director of Programming
Time Warner Cable
750 Canyon Drive-5th Floor
Coppell, TX 75019

EXHIBIT

2

DECLARATION OF TIMOTHY P. NOBLE

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

Time Warner Cable

Emergency Petition for Finding of Bad
Faith Retransmission Consent
Negotiations

KVOA Communications, Inc.
KRIS-TV, Corpus Christi, Texas

File No. CSR-_____

MB Docket No. 12-1

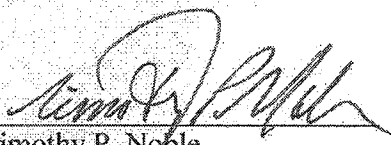
To: The Secretary's Office
Attn: The Media Bureau

DECLARATION OF TIMOTHY P. NOBLE

1. My name is Timothy P. Noble, and I am the General Manager of KRIS-TV, KRIS-DT2, K68DJ ("KAJA-TV), and K47DF ("KDF") (the "Stations"). As part of my duties, I represent the Stations in retransmission consent negotiations with multichannel video programming distributors, including cable operators, that provide service to the Corpus Christi, Texas Designated Market Area. I have been participating in retransmission consent negotiations for 8 years.
2. In the performance of my duties, I have represented the Stations in retransmission consent negotiations with Time Warner Cable ("TWC") since October of 2011. I have first hand knowledge of all the correspondence and telephone communications that comprised the parties' negotiations.
3. I have reviewed the foregoing Petition for Finding of Bad Faith Retransmission Consent Negotiations and declare that the facts contained therein regarding the negotiations between the Stations and TWC are true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 12, 2012


Timothy P. Noble
President and General Manager
KRIS Communications

EXHIBIT

3

Letter from Timothy P. Noble, President and
General Manager, KRIS Communications, to
Time Warner Cable



Attention: Time Warner Cable
Time Warner Cable
60 Columbus Circle
New York, NY 10023

To whom it Concerns:

I am encouraged by the progress we have made in reaching a new agreement for carriage of KRIS, CW-South Texas, KDF and KAJA-Telemundo on Time Warner.

While we continue to work toward a new contract, I want to reiterate my offer to extend our current agreement for all 4 of our stations through 12/31/11. This will ensure that our top rated local news, sports, weather and entertainment programming remains on the Time Warner systems without disruption to our viewers.

Thank you for your cooperation.

Sincerely,

A handwritten signature in black ink, appearing to read "Timothy P. Noble".

Timothy P. Noble
President & General Manager
KRIS Communications
301 Artesian Street
Corpus Christi, Texas 78401

CERTIFICATE OF SERVICE

I certify that on this 12th day of January, 2012, I caused the foregoing Petition for Finding of Bad Faith Retransmission Consent Negotiations to be served by first-class mail, except where indicated by *, on the following:

William T. Lake*
Chief, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Michelle Carey*
Deputy Chief, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Mary Beth Murphy*
Chief, Policy Division, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Ronald Parver*
Assistant Chief, Policy Division, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Suzanne M. Tetreault*
Acting Chief, Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Nancy Murphy*
Associate Chief, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Steven A. Broeckaert*
Deputy Chief, Policy Division, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Alexis Johnson
Vice President, Contact Acquisition
Time Warner Cable
60 Columbus Circle
New York, NY 10023

* via email


Rayya Khalaf